

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

CRIMINAL 06-10242-RWZ

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UNITED STATES OF AMERICA

V

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FRANK FAGONE

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**DEFENDANT'S SENTENCING MEMORANDUM  
F. R. CR. P. 32(a) AND 18 U.S.C. SEC. 3553(a)**

This memorandum is submitted to present the defendant's proposal as to an appropriate sentence and the reasons therefore pursuant to this Court's order of September 4, 2007. Frank Fagone pled guilty to the four counts of the indictment alleging conspiracy, distribution and possession with intent to distribute controlled substances (heroin and cocaine). There is no mandatory minimum sentence prescribed by statute. The defendant does not challenge the presentence report regarding the factual assertions contained in the report or the calculations presented regarding the guidelines. It is the defendant's assertion that the sentence suggested by the guidelines and the pre-sentence report is substantially greater than is "necessary to comply with the purposes set forth" in 18 U.S.C. 3553 (a). Specifically it is the defendant's position that following the career offender guidelines would be particularly inappropriate in this case.

**SENTENCING FRAMEWORK AFTER KIMBROUGH**

In light of the Supreme Court's recent decision in Kimbrough and Gall it is apparent that this Court has ample discretion to stray from the dictates of the Guidelines. Kimbrough v. U.S., 552 U.S.\_\_\_\_ (2007); Gall v. U.S., 552 U.S.\_\_\_\_ (2007). As if to say "Yes we really meant advisory!", the Court affirmed the District Court's rejection of the explicit dictates of Guideline crack cocaine provision. USSG sec. 2D1.1. The Court affirmed the District Court's finding that

the effect of the 100 to 1 crack ratio would have led to a sentence which was disproportionate and unjust. The Court continues to emphasize that the guidelines are the beginning point of a sentencing analysis. Reasoning that because the guidelines were not based on empirical sentencing data they were particularly subject to challenge if empirical data was presented to the sentencing Court. The Court was presented with just such data by the Sentencing Commission which had unsuccessfully sought to modify the guidelines through Congress. Further the 100 to 1 ratio was inconsistent with Congress' general policy of dividing the punishments for drug offenses into two major categories based on weight. A low level street dealer was likely to be punished as severely as a major drug trafficker. Finally the Court concluded that the guideline provision fostered disrespect for the law because it tended to create the perception of disparities in sentencing which were based upon race.

There is no legal presumption that the Guidelines should govern in any particular situation. United States v. Booker, 543 U.S. 220 (2005); United States v. Jimenez-Beltre, 440 F. 3d 514 (CA1 2006). They offer merely a "rough approximation" of sentences which might meet the objectives of sec. 3553(a). Rita v. U.S., 551 U.S. (2007). The guidelines focus primarily on the past criminal activity for aggravating or mitigating factors. Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1. While this approach serves the purpose of providing some consistency in sentences, it does not fulfill a judges obligations of addressing the individual issues of any particular defendant. A myopic focus on the guideline range of sentencing not only undercuts the concept of "advisory" guidelines but it skirts the primary responsibility of the sentencing judge. Gall reminds us that the sentencing judge is in a superior position to find fact relevant to the particular case. Each judge in evaluating an individual to be sentenced must:

"consider every convicted person as an individual and every case

as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue”

Koon v. United States, 518 U.S. 81 @ 113 (1996)

It is submitted that after due consideration of this “unique study” this court should impose a sentence lower than that provided by the presentence report. The career offender provisions of the guidelines in this case are subject to the same criticism and the crack ratio in the Kimbrough case. The sentencing range proposed in the pre-sentence report fails to properly reflect all of the section 3553(a) considerations, falls outside the “heartland” of the guidelines and grossly overstates the seriousness of the defendant’s record. USSG sec.5K2.0, United States v. Booker, 543 U.S. 220 (2005), Kimbrough, supra.

#### **FACTORS MITIGATING IN FAVOR OF A LESSER SENTENCE IN THIS CASE**

The pre-sentence report calculates the advisory sentence following the career offender guidelines. USSC sec. 4B1.1. The defendant does not contend that the guidelines are incorrectly calculated. However they do lead to an advisory sentence which is, like the sentence in Kimbrough is disproportionate and unjust. For many of the same reasons cited in Kimbrough, the career criminal guidelines should not be followed in this case. The defendant’s criminal history category is VI without regard to the career criminal guideline. However the actual offense level before applying the career criminal guideline is 18, which corresponds to a suggested sentence range of 57 to 71 months. This is a substantial sentence for conduct that the probation officer refers to as offenses which “arguably involved a relatively small amount of drugs”. (PSR paragraph 157).The instant indictment involved drugs of an equivalent weight of 54.06 Kg of marihuana. There were two transactions over a one week period. However, when calculations are made which consider the career criminal provisions, the offense level jumps to 32 and the sentencing range is now 210 to 262 months.

Initially it is obvious that the career criminal designation mandates a range that does not

comport with the seriousness of the defendant's conduct. If the defendant was not designated a "career criminal" he would have to have been involved in transactions involving 3,000 to 10,000 KG of marihuana to reach an offense level of 32. USSC guideline 2D1.1. Had the defendant been involved in transactions of fifty to 200 times the amount of illegal drugs involved in the instant case, he certainly would have earned the distinction of being labeled a major dealer. As noted in Kimbrough, Congress had sought to establish a scheme of sentencing based on the amount of drugs and designating defendants as "major" or "serious" dealers. The sentencing Commission established the guidelines offense level also based on weight. The career criminal guidelines, like the crack ratio in Kimbrough, established an artificially high range of punishment. It is no stretch of the imagination to foresee that the disparate punishment cannot possibly foster respect for the sentencing process. If the defendant is to be sentenced in the same range as someone who traffics in drugs with weights 150 times the amount involved in his case, then there should be a strong justification for the disparity. There is no such justification.

The lone justification for the increase in offense level and corresponding increase in suggested sentencing range is the existence of three prior convictions. These prior state convictions as set out in the presentence report involve the possession "with intent to distribute" what was alleged to be crack cocaine on three occasions over a six month period in a total amount of at least 20 grams. Apparently the "intent" was to be proven by the amount in the defendant's possession. The reports indicate that he was not involved in any sale or distribution and that the question of "possession" was not a foregone conclusion. He pled guilty to all three offenses on the same day and received concurrent sentences of two years in the House of Correction on each. The sentence established his parole eligibility at one year. For these convictions he now stands to be sentenced as if he were major drug dealer with nearly two hundred times the amount of drugs associated with this indictment. The guidelines in general,

but in this case in particular, tend to create sentences which are not consistent with Congress' intent to punish the "major drug traffickers more severely than low-level dealers." Kimbrough, supra at 9.

As noted in Kimbrough, the Commission established the guidelines without the benefit of empirical data. Since that time data has been collected and published by the Commission in its 15 year assessment. Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of the Sentencing Reform, 2004. (hereinafter the 15 Year Report) Like the crack cocaine guidelines in Kimbrough, the Commission has become critical of the career criminal guidelines. Recidivism is obviously one of the most important considerations in determining an appropriate sentence. The Commission found that the designation of career offender status has no justification in an increased risk of recidivism. There is no evidence that the final guideline offense level is related to the recidivism rate.

..The recidivism rates are essentially the same, regardless of the offender's offense severity under the sentencing table. This relationship is consistent with the principle that the Guideline offense level is not designed to predict recidivism, while the criminal history computation is designed to predict recidivism. Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, Release 1, May 2004, page 13 (hereinafter Release 1)

Thus, setting the offense level at a particular level has no bearing on the recidivism rate. The recidivism rate is related to criminal history and is adequately accounted for in the criminal history calculation.

Another Commission criticism of the career offender guidelines is its disproportionate impact on a particular group. Like the crack guideline in Kimbrough, the career offender guidelines disproportionately affect African Americans. The career offender rule is one that: ... has a disproportionate impact on a particular offender group (African Americans)

but that serves no clear sentencing purpose...The recidivism rate for career offenders more closely resembles the rates for offenders in the lower criminal history categories in they would be placed under normal criminal history rules in Chapter Four of the Guidelines Manual. The career offender guidelines thus make the criminal history category a less perfect measure of recidivism than it would be without the inclusion of offenders qualifying only because of prior drug offenses. 15 Year Report @ 134

The career offender guidelines can only foster disrespect for the law because of the perception that they promote unwarranted disparities based on race.

The career offender guidelines are inconsistent with the Congressional intent to punish major dealers more severely than street level sellers, they promote disrespect for the law by giving the perception of racially based sentencing and they are not related to the goals of reducing recidivism. In sum they promote unjust sentences which cannot be justified. The facts in this case make the application of the career offender guidelines particularly inappropriate. The evidence of Mr. Fagone's crimes (those in this indictment and those prior state Court convictions) shows that he is lower level street dealer. The criminal history points adequately take into account this past behavior. Further enhancement of the sentence by raising the offense level is not appropriate in this case.

In addition, the sentencing research illuminates other factors which should help the Court in fashioning an appropriate sentence in this case. The rate of recidivism for those involved in drug trafficking offenses is one of the lowest in the study. Release 1 @ 13. It should be noted that all of the offenses which form the basis for the career offender status involve drug offenses. Age is also an important factor in determining recidivism. Generally recidivism rates decline consistently as age increases. Mr. Fagone is now twenty-four years old. It is expected that as he gets older he will become more mature in his decision making and his choices of life style will be better suited to societal norms.

Apart from the professional sentencing literature, the Court needs to consider the offense and the characteristics of the defendant. The instant offense and most of the prior criminal record

do not indicate that the defendant has a propensity for violence. The records do support the defendant's contention that he sold drugs as a way of survival and to provide necessities for him and for his family, principally his younger brother. As a child and young adult he was the subject of abuse in the form of extreme neglect. As a result of this neglect he learned to provide for himself and his siblings in any way he could. He grew up without the structure, direction and care which would allow him to avoid conflicts with the law. It is clear that he considers himself to be father figure in his relationship with his younger brother. His ex-girlfriend indicated that she still thinks of him as a "good person" who is a loving father to his child.

Further, in the evaluation prepared by the defense expert (attached hereto) there is no indication of mental abnormality which would require special attention, treatment or possibly lead to behavioral problems in the future. Mr. Fagone is able to appropriately interact with his peers and genuinely cares for those close to him. Although he has some learning deficits, these limitations are not of the magnitude that would prevent him from gainful employment. He has some high school education and may well be able to complete that education. It is apparent that if he had some job training and direction he would not have to resort to drug dealing for his support. He clearly feels an obligation to support those who are close to him including his son. To date he learned from experience, experience that included no positive feedback or direction, that the only way to fulfill that obligation is by illegal means.

It is submitted that Mr. Fagone is at a time in this life when he can change course and learn to direct his energy to supporting his family by legal means. He is of an age which indicates he is capable of mature decision making. He is capable of mastering a trade to provide for himself and those close to him. This court should consider alternatives which would encourage employment training. He is in a class of defendants (drug related) that are statistically less likely to re-offend. This Court should consider these factors in determining what sentence

would be "sufficient but not greater than necessary" to comply with the purposes of sentencing.

### **CONCLUSION**

For the above reasons the defendant requests that the sentence imposed be not more than three years incarceration followed by supervised release.

Respectfully submitted:

/s/ John P. Moss, Jr.

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### **CERTIFICATE OF SERVICE**

I, John P. Moss Jr., hereby certify that this document was sent electronically to the registered participants as identified on the Notice of Electronic filing by the CM/ECF of this District today December 17, 2007. No party requires service by mail.

/s/ John P. Moss,Jr.  
John P. Moss, Jr.